

DEC 23 2005

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**GOLDEN EAGLE INSURANCE
COMPANY, a California corporation,**

Plaintiff - Appellant,

v.

**FEDERAL INSURANCE COMPANY,
a corporation,**

Defendant - Appellee.

No. 03-57182

D.C. No. CV-02-09079-SJO

MEMORANDUM*

**Appeal from the United States District Court
for the Central District of California
S. James Otero, District Judge, Presiding**

**Argued and Submitted October 18, 2005
Pasadena, California**

Before: KLEINFELD, TASHIMA and FISHER, Circuit Judges.

**Golden Eagle Insurance Company appeals the district court's grant of
summary judgment in favor of Federal Insurance Company in a diversity action
seeking equitable contribution from Federal for defense costs associated with**

*** This disposition is not appropriate for publication and may not be
cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.**

defending a lawsuit against the two insurers' mutual insured. Because the parties are familiar with the facts, we do not recite them in detail. We reverse.

The district court incorrectly found that Golden Eagle did not give sufficient notice to Federal that there was an on-going claim prior to incurring defense expenses, for which Golden Eagle would later seek contribution. The circumstances in *Truck Ins. Exch. v. Unigard Ins. Co.*, 79 Cal.App.4th 966 (2000), on which the district court relied, are distinguishable from the facts here.

There, a company faced with multiple lawsuits tendered the defense of the actions to Truck, one of its insurers. After paying defense costs and indemnity, Truck sought equitable contribution from its apparent co-insurer, Unigard. The court of appeal held that Unigard was entitled to refuse to contribute because it had not been asked to participate in the litigation until after its resolution. *Id.* at 979. Several facts distinguish this case from *Truck*. First, Federal, unlike Unigard, had no duty to defend its insured under the terms of its policy; it had only a duty to reimburse. Second, the litigation was tendered to Federal at the outset, and Federal acknowledged coverage and consented to the defense; Unigard, on the other hand, received no notice of the case until well after its conclusion. Third, Federal chose not to participate in the defense on the basis of its other-insurance clause; Unigard had no opportunity to exercise any such option because it never knew of a defense

in which to share control. Fourth, when notified prior to trial that a new proceeding was imminent as a result of the failure of a settlement, Federal again refused to take part in the defense. Thus, unlike in *Truck*, where Unigard was put on notice wholly after the fact and was indeed a “stranger to the litigation,” *id.*, Federal was tendered with its potential liability early on and subsequently and at all times declined to be involved in the defense of its insured.

Notwithstanding its awareness of the litigation, Federal argues that it had no notice that Golden Eagle intended to seek contribution until it made its request, *after* trial. However, when the two companies communicated in December 2000, four months before trial actually began in March 2001, it had to be obvious to Federal that at least one of the reasons Golden Eagle was giving it notice was to alert Federal that its duty to reimburse the defense costs of the mutual insured had been revived.¹ That Golden Eagle did not expressly use the words “equitable contribution” is not fatal to its claim to such contribution under California insurance law.

¹ The dissent estimates that Golden Eagle incurred \$138,000 in attorney’s fees *prior* to the time Golden Eagle notified Federal that the settlement had fallen through and the case was proceeding to trial. Federal has not argued this number to us, and the record is not clear that the number is correct.

Because Federal was tendered with the matter at the outset, acknowledged coverage, consented to the defense and was later notified again that the settlement had collapsed and a future trial loomed, the district court erred in finding that Federal did not receive sufficient notice from Golden Eagle. We reverse the district court's summary judgment granted to Federal. Golden Eagle is entitled to an award of equitable contribution in an amount to be determined by the court.

The judgment of the district court is **REVERSED** and **REMANDED** for proceedings consistent with this disposition.